

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WATERTON GLOBAL MINING COMPANY,
LLC and CHUBB INSURANCE COMPANY
OF CANADA,

Plaintiffs,

vs.

CUMMINS ROCKY MOUNTAIN, LLC,
CUMMINS, INC., and DOES 1–40, inclusive,

Defendants.

3:14-cv-0405-RCJ-VPC

ORDER

This case arises out of property damage caused by a fire that started in Defendants Cummins, Inc. and Cummins Rocky Mountain, LLC's ("CMR") (collectively "Defendants") allegedly defective engine. Pending before the Court are Defendants' Motion to Dismiss (ECF No. 29) and Motion in Limine (ECF No. 26).

I. FACTS AND PROCEDURAL HISTORY

On December 14, 2011, a fire started at the Hollister Mine facility located at the Carlin Trend in Elko County, Nevada. (Compl. ¶ 1, ECF No. 1-2). The fire was allegedly caused by an engine manufactured by Cummins, Inc. and installed by CRM in a generator located at the facility. The fire destroyed that generator as well as a second generator, which together acted as the primary source of electricity for the Hollister Mine. (*Id.* ¶¶ 11, 13).

At the time of the fire, the Hollister Mine was owned by Great Basin Gold Inc. ("Great

1 Basin”). Great Basin had secured an insurance policy from Plaintiff Chubb Insurance Company
2 (“Chubb”) prior to the fire, which covered the type of loss the fire allegedly caused. (*Id.* ¶ 8).
3 Great Basin made a claim on its insurance policy, and Chubb paid Great Basin an amount in
4 excess of \$10,000, thereby subrogating itself to the rights of Great Basin against all responsible
5 parties. (*Id.*).

6 Subsequently, Waterton acquired assets from Great Basin through an Asset Purchase
7 Agreement (“APA”) that allegedly included Great Basins’ claim for damages related to the
8 damage caused by the fire at the Hollister Mine. Plaintiffs allege that Defendants acts or
9 omissions caused Great Basin damages that were not covered by insurance in an amount
10 exceeding \$10,000. (*Id.* ¶ 9). Plaintiffs allege that the engine failed, causing the fire and
11 resulting in severe damage to the engine itself, the generator, as well as to other property located
12 at the facility. (*Id.* ¶ 12). Plaintiffs also allege that Defendants were responsible for assembling,
13 inspecting, testing, designing, and installing the engine so that it would not fail and cause a fire.
14 (*Id.* ¶ 13). Plaintiffs assert that the property damage at issue in this case occurred because of
15 Defendants’ improper manufacture, design, and installation of the engine. (*Id.* ¶ 15).

16 The Complaint includes four causes of action. The first cause of action claims strict
17 products liability and alleges that a defect existed in Defendants’ engine that rendered it
18 unreasonably dangerous. (*Id.* ¶ 20). The second cause of action claims negligence and alleges
19 that Defendants acted carelessly and negligently in assembling, inspecting, and installing the
20 engine. (*Id.* ¶ 27). The third cause of action claims a breach of implied warranties and alleges
21 that the engine was improperly manufactured and unreasonably failed. (*Id.* ¶ 33). The fourth
22 cause of action claims a breach of express warranties and alleges that Defendants warranted that
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1 the engine would be built in compliance with industry standards and would fulfill the purpose of
2 generating electricity in the Hollister Mine.

3 This action was initially filed in state court and then removed to this Court by
4 Defendants. (ECF No. 1). Defendants now move for dismissal of the Complaint pursuant to
5 Rule 12(b)(6) for failure to state a claim. Defendants also filed a Motion in Limine requesting
6 that the Court preclude Waterton and Chubb from claiming “replacement value” damages for the
7 generators. The Court addresses each Motion in turn.

8 **II. MOTION TO DISMISS**

9 **A. Legal Standard**

10 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the
11 legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The issue
12 is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer
13 evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997)
14 (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does not need detailed
15 factual allegations, but it must plead “enough facts to state a claim to relief that is plausible on its
16 face.” *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell*
17 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
18 (stating that a “claim has facial plausibility when the plaintiff pleads factual content that allows
19 the court to draw the reasonable inference that the defendant is liable for the misconduct
20 alleged”). Even though a complaint does not need “detailed factual allegations” to pass Rule
21 12(b)(6) muster, the factual allegations “must be enough to raise a right to relief above the
22 speculative level . . . on the assumption that all the allegations in the complaint are true (even if
23 doubtful in fact).” *Twombly*, 550 U.S. at 555. “A pleading that offers ‘labels and conclusions’ or
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1 ‘a formulaic recitation of the elements of a cause of action will not do.’ *Iqbal*, 556 U.S. at 678.
2 “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
3 enhancements.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

4 **B. Analysis**

5 **1. Tort Claims**

6 Defendants argue that Waterton’s first and second causes of action for strict product
7 liability and negligence must be dismissed because Nevada law does not permit the assignment
8 of tort claims. It is clear that under Nevada law tort claims involving personal injuries are not
9 assignable, meaning that the right to bring a cause of action for injuries of a personal nature
10 cannot be transferred. *Achrem v. Expressway Plaza Ltd. P’ship*, 917 P.2d 447, 448 (Nev. 1996);
11 *Davenport v. State Farm Mut. Auto. Ins. Co.*, 404 P.2d 10, 11 (Nev. 1965). It is not entirely
12 clear, however, whether Nevada law precludes the assignment of tort claims arising from
13 property damage.

14 Defendants cite *Achrem* in support of their contention that Great Basin could not as a
15 matter of law assign its tort claims to Waterton through the APA. In *Achrem*, the Nevada
16 Supreme Court dealt with the issue of whether funds from the settlement of a personal injury
17 lawsuit could be assigned to a third party. The court noted that at common law, “an assignment
18 of the right to a personal injury action was prohibited.” 917 P.2d at 448. But the court also
19 identified that many states today draw a distinction between assignment of the action itself and
20 assignment of the proceeds of that action. *Id.* The difference is “when a tort action is assigned,
21 the assignor loses the right to pursue the action However, when the proceeds of an action
22 are assigned, the assignor retains control of the action and the assignee cannot pursue the action
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1 independently.” *Id.* The court determined that the policy considerations underlying the
2 prohibition against assignments of tort actions are not present in the assignment of proceeds. *Id.*

3 Although the *Achrem* court used the term “tort action” generally in its discussion
4 regarding assignability, the context of the case implies that it was discussing specifically whether
5 tort actions arising from personal injury could be assigned. For instance, the *Achrem* court noted
6 that “the assignability of the rights to a tort action” was first addressed in *Davenport*. In that
7 case, the Nevada Supreme Court was again concerned with whether the right to sue in tort for
8 personal injuries could be assigned under Nevada law. 404 P.2d at 365. Its ultimate conclusion
9 was related to settlements of personal injury actions and the court’s discussion focused solely on
10 tort actions arising from personal injury.

11 In *Maxwell v. Allstate Ins. Co.*, 728 P.2d 812 (Nev. 1996), another case cited by the
12 *Achrem* court, the issue was whether subrogation clauses in automobile insurance policies
13 dealing with medical payments violated public policy. There, the court stated that “[w]hether the
14 subrogation clause is viewed as an assignment or as an equitable lien on the proceeds of any
15 settlement, the effect is to assign a part of the insured’s right to recover against a third-party
16 tortfeasor.” 728 P.2d at 814. The court held that such an assignment is invalid because it
17 deprived the insured from receiving the insurance benefits “for which he has paid a premium.”
18 *Id.* at 815. The court’s holding rested on public policy rationales related to the injured
19 individual’s ability to “fully recover his actual damages.” *Id.*

20 The *Achrem* court stated that although *Maxwell* dealt with subrogation clauses, “the
21 reasoning of *Maxwell* applies equally wherever an assignment agreement assigns to a third party
22 the right of an injured plaintiff to recover against a tortfeasor.” 917 P.2d at 449. However, the
23 *Achrem* court did not explain how the *Maxwell* decision applies or if the public policy reasons
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1 identified in *Maxwell* expand beyond the context in which it was decided—personal injury.

2 Indeed, given the facts of the *Maxwell* case, it appears to the Court that the term “injured
3 plaintiff” refers to a plaintiff suffering personal injury rather than a property related injury.¹

4 Thus, the Court finds that *Achrem* does not settle the issue of whether tort claims arising
5 from property damage may be assigned under Nevada law. The Court, however, failed to locate
6 any Nevada case dealing specifically with whether tort actions related to interests in property are
7 assignable.

8 Where “there are no Nevada Supreme Court decisions directly on point, we ‘must predict
9 how the highest state court would decide the issue using intermediate appellate court decisions,
10 decisions from other jurisdictions, statutes, treatises, and restatements as guidance.’” *Eichacker*
11 *v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004) (citing *S.D. Myers, Inc. v. City*
12 *and Cnty. of S.F.*, 253 F.3d 461, 473 (9th Cir. 2001)). Applying this standard to the present case,
13 the Court predicts that the Nevada Supreme Court would likely hold that a tort action based on
14 property damage may be assigned without violating law or policy.

15 The test for assignability of a cause of action in Nevada appears to be whether the cause
16 of action survives to the personal representative of the assignor. *See Davenport*, 404 P.2d at 12
17 (stating that “it is now quite generally accepted that the assignability of the right to sue in tort for
18 personal injuries is governed by the test of survivorship”). Indeed, “[t]he right to assignment of a
19 cause of action for injury to property is generally recognized because of the survivability of the

20 ¹ Defendants also cite *Volvo Construction Equipment Rents, Inc. v. NRL Rentals, LLC*, No. 2:09-cv-00032-JCM-
21 VCF, 2012 WL 27615 (D. Nev. Jan. 3, 2012), for the proposition that Nevada does not allow the assignment of tort
22 claims arising from property damage. (Mot. to Dismiss 5, ECF No. 29). In *Volvo*, the court considered whether the
23 plaintiff could pursue causes of action in tort assigned to it by a third party in a non-personal injury case. Judge
24 Mahan noted briefly that an “[a]ssignment of tort claims violates public policy because it eliminates the injured
party’s ability to prosecute the action independently.” 2012 WL 27615, at *2 (citing *Achrem*, 917 P.2d at 449).
Based on a single citation to *Achrem*, the court found that “under Nevada law an assignment of a tort claim is
invalid.” *Id.* However, no analysis was conducted as to whether the *Achrem* holding was limited to the personal
injury context in which it was decided or whether the Nevada Supreme Court intended to prohibit the assignability
of all tort actions. Accordingly, the Court finds that the *Volvo* decision holds no persuasive authority as to the
current state of Nevada law on this issue.

1 cause action, whether the cause of action is, technically speaking, for a tort or for breach of
2 contract.” 6A C.J.S. *Assignments* § 51 (2014).

3 The Nevada legislature has provided for the survival of all causes of action. Nev. Rev.
4 Stat. § 41.100(1) (“[N]o cause of action is lost by reason of the death of any person, but may be
5 maintained by or against the person’s executor or administrator.”). As a matter of public policy,
6 however, the Nevada Supreme Court has recognized specific instances where a particular cause
7 of action is not assignable, including personal injury claims, *Achrem*, 917 P.2d at 448, legal
8 malpractice claims, *Chaffee v. Smith*, 645 P.2d 966, 966 (Nev. 1982), and fraud claims, *Prosky v.*
9 *Clark*, 109 P. 793, 794 (Nev. 1910).

10 It appears that a significant policy reason for precluding the assignment of the tort action
11 in these cases is premised on the personal nature of the claim itself. In *Achrem*, the court cited to
12 *Karp v. Speizer*, 647 P.2d 1197 (Ariz. Ct. App. 1982), an Arizona case dealing with the
13 assignment of personal injury torts. There, the Arizona court recognized that actions for personal
14 injuries are based in large part on the pain and suffering experienced by the victim herself. 647
15 P.2d at 1199. Similarly, in *Chaffee*, the Nevada Supreme Court held that “[t]he decision as to
16 whether to bring a malpractice action against an attorney is one peculiarly vested in the client.”
17 645 P.2d at 966. Again focusing on the impact to the victim, the *Prosky* court determined that
18 “[r]ights of action based on fraud . . . are held by the courts to be not assignable, but are personal
19 to the one defrauded.” 109 P. at 794.

20 There is no indication, however, that the policies mentioned in *Achrem*, *Chaffee*, and
21 *Prosky* would apply in situations where a cause of action for damage to property is assigned,
22 since the harm alleged in such a claim is specific to the property rather than the individual. *TMJ*
23 *Haw., Inc. v. Nippon Trust Bank*, 153 P.3d 444, 452 (Haw. 2007) (noting that “personal” tort
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claims involve “torts to the person or character, where the injury and damage are confined to the body and the feelings” rather than “those that arise out of an injury to the claimant’s property or estate”). Damage to property harms the property owner due to the individual’s status as the property’s owner. Because the property itself may be transferred, the right to recover for the damage thereto may also be transferred. *See* 6A C.J.S. *Assignments* § 51 (noting that the right of action in tort involving damage to real or personal property is especially assignable “when the assignee has acquired title to the property”). The damage does not impact the owner in the same manner as harm suffered from a personal injury. This is significantly different from tort claims involving personal harm where the individual herself is injured and permitting assignability may lead to “unscrupulous people . . . traffic[king] in pain and suffering.” *Karp*, 647 P.2d at 1199 (quoting *Harleysville Mut. Ins. Co. v. Lea*, 410 P.2d 495, 498 (Ariz. Ct. App. 1966)).

Moreover, states with broad survivability statutes similar to that of Nevada have recognized the assignability of causes of actions for damage to property. *See, e.g., Timed Out, LLC v. Youabian, Inc.*, 177 Cal. Rptr. 3d 773, 780 (Ct. App. 2014) (recognizing a broad rule of assignability including the assignability of actions involving an injury to personal or real property)²; *St. Luke’s Magic Valley Reg’l Med. Ctr. v. Luciani*, 293 P.3d 661, 665 (Idaho 2013) (recognizing the general rule allowing claim assignment)³; *Webb v. Gittlen*, 174 P.3d 275, 278 (Ariz. 2008) (stating that under Arizona law, “claims generally are assignable except those involving personal injury”)⁴; *Cooper v. Runnels*, 291 P.2d 657, 658 (Wash. 1955) (holding that

² *See also* Cal. Civ. Code § 954 (“A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner.”).

³ *See also* Idaho Code § 55-402 (“A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner.”).

⁴ *See also* Ariz. Rev. Stat. § 14-3110 (“Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor, and may be asserted by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.”).

1 “a tort claim for damage to property is assignable under the law of this state”)⁵.

2 And states that do not necessarily agree that survivability and assignability are always
3 coterminous have generally allowed the assignability of property tort claims while precluding the
4 assignability of personal causes of action. *See, e.g., TMJ Haw., Inc.*, 153 P.3d at 452 (rejecting
5 the survivability test and distinguishing between “personal” tort claims and “property” tort
6 claims to determine whether the action may be assigned); *Midtown Chiropractic v. Ill. Farmers*
7 *Ins. Co.*, 847 N.E.2d 942, 945 (Ind. 2006) (stating that a tort based in injury to property is
8 assignable while a cause of action in tort to recover for personal injuries is not); *Gregory v.*
9 *Lovlien*, 26 P.3d 180, 182 (Or. Ct. App. 2001) (recognizing that claims related to a “property
10 rather than a personal interest” may be assigned); *Moss v. Taylor*, 273 P. 515, 519 (Utah 1928)
11 (stating as “well established” that “[a] cause of action for injury to property is assignable”).

12 The Court, therefore, finds that under Nevada law, a tort action to recover damages to
13 property is likely assignable. Furthermore, “[u]nder the general rule as to the assignability of a
14 right of action for injury to property, an assignment may be made of a right of action . . . for
15 negligence involving damage to property” 6A C.J.S. § 51. Waterton’s first and second
16 causes of action for strict product liability and negligence that allegedly resulted in damage to the
17 generators and the Hollister Mine facility may thus be maintained. Defendants’ Motion is denied
18 as to those claims.

19 **2. Breach of Implied and Express Warranties**

20 Defendants also argue that Plaintiffs’ third and fourth causes of action must be dismissed
21 because Waterton did not acquire any express or implied warranty claim that Great Basin may
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23 ⁵ See also Rev. Code Wash. § 4.20.046 (stating that “[a]ll causes of action by a person or persons against another
24 person or persons shall survive to the personal representatives of the former and against the personal representatives
of the latter . . .”).

1 have had with respect to the engine and the damage it allegedly caused. (Mot. to Dismiss 5, ECF
2 No. 29). The APA states in relevant part that:

3 Subject to the terms and conditions of this Agreement and the Sale Order, and
4 upon entry of the Sale Order, at the Closing, the Sellers shall sell, convey, assign,
5 transfer and deliver to the Buyer, free and clear of all Liens (other than Permitted
6 Liens) as provided in the Sale Order and Buyer shall purchase, acquire and accept
7 from the Sellers, all of the Sellers' right, title, and interest in each and all of the
8 Acquired Assets. "**Acquired Assets**" means all properties, assets and rights of
every nature, tangible and intangible, real or personal, now existing or hereafter
acquired, whether or not reflected on the books or financial statements of the
Sellers as the same shall exist on the Closing Date that are (a) owned by any
Seller, (b) used or held in connection with the ownership, lease, use or operation
of the Business and (c) not Excluded Assets.

9 (APA § 2.1, at 10, ECF No. 29-1).⁶ The APA further states that Acquired Assets include:

10 [A]ll rights, Claims, actions, refunds, causes of action, suits or proceedings, rights
11 of recovery, rights of setoff, right of recoupment, right of indemnity or
12 contribution and other similar rights . . . against any Person, including all
warranties, representations, guaranties, indemnities and other contractual Claims,
in each case, to the extent related to the other assets set forth in this Section 2.1 or
the Assumed Liabilities

13 (*Id.* § 2.1(h), at 11). According to Defendants, the APA "is clear" that "only those claims
14 involving 'Machinery and Equipment' that is 'used or held for use in the operation of the
15 business'" were transferred to Waterton. (Mot. to Dismiss 6, ECF No. 29). They argue that
16 because the warranty claims involve a generator that was destroyed more than a year before the
17 sell, it is "not a piece of equipment being used or held for use in operation of the business." (*Id.*).
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19 The Court finds that Defendants read the APA too narrowly. As Waterton points out, the
20 Acquired Assets include properties "(a) owned by any Seller" and "(b) used or held in
21 connection with the ownership . . . of the Business." The engine and generator, although

22 ⁶ Generally, on a motion to dismiss the court will not review documents that are not attached to the complaint,
23 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006), unless the complaint necessarily relies on the document, *United*
24 *States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003). Although the APA is not attached to Plaintiffs' Complaint,
they do not object to the Court considering its provisions in ruling on this Motion and in fact they urge the Court to
consider its terms. (Pls.' Opp'n 8, ECF No. 35). The Court will do so, noting that the Complaint references the APA
at least once. (*See* Compl. ¶ 10).

1 damaged and presumably no longer functional, appear to have still been owned by Great Basin
2 when the APA was signed. And while the engine and generator were likely no longer useable at
3 the time of sale, that does not mean that Great Basin no longer “held” them “in connection with
4 the ownership” of the Hollister Mine.

5 Furthermore, the APA seems to expressly provide for the assignment of any warranties
6 related to equipment owned by Great Basin at the time of the sale. Under the APA, Acquired
7 Assets also includes:

8 [A]ll of (i) the Sellers’ owned equipment (including any cars, trucks, forklifts and
9 other industrial vehicles, machinery (whether mobile or otherwise), materials,
10 furniture, fixtures, improvements, tooling and other tangible property used or held
11 for use in the operation of the Business (the “***Owned Machinery and Equipment***”) . . . (iii) the rights of the Sellers to any warranties, express or
implied, and licenses received from manufacturers and sellers of the Machinery
and Equipment.

12 (APA § 2.1(b), at 10–11). Defendants argue that because the engine was no longer operable it
13 cannot qualify as being “used or held for use in the operation of the Business.” (Mot. to Dismiss
14 6). The Court disagrees. First, simply because a piece of equipment or machinery is not
15 functional does not necessarily mean that it is not being held for use in the operation of a
16 business. A piece of machinery may at a minimum provide a source for spare parts.

17 Second, there is no indication that the parties intended to exclude broken equipment or
18 machinery from that which was transferred via the APA. The APA covered all assets owned by
19 the Sellers and held in connection with the ownership of the Hollister Mine. The allegedly
20 defective engine appears to fall into this category. Additionally, beyond the provision specific to
21 the assignment of warranty rights related to the Owned Machinery and Equipment, the APA also
22 includes a general transfer of warranties related to “the other assets set forth in . . . Section 2.1.”
23 (APA § 2.1(h), at 11).

1 Thus, even if Defendants dispute whether the warranties related to their engine and
2 generator actually transferred to Waterton, there is sufficient evidence before the Court for it to
3 determine that the warranty claims are at least plausible. *See Iqbal*, 556 U.S. at 678. The Court
4 denies Defendants' Motion to Dismiss as to the third and fourth causes of action as well.

5 **III. MOTION IN LIMINE**

6 **A. Legal Standard**

7 A motion in limine has been defined as "any motion, whether made before or during trial,
8 to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v.*
9 *United States*, 469 U.S. 38, 40 n.2 (1984). "A motion in limine is a request for the court's
10 guidance concerning an evidentiary issue." *Goodman v. Las Vegas Metro. Police Dep't*, 963 F.
11 Supp. 2d 1036, 1046 (citing *Wilson v. Williams*, 182 F.3d 562, 570 (7th Cir. 1999)). And
12 although the Federal Rules of Evidence do not explicitly authorize such a motion, trial judges
13 may rule on motions in limine based on their inherent authority to manage trials. *See Luce*, 469
14 U.S. at 41 n.4 (citing Fed. R. Evid. 103(c) (providing that trial should be conducted so as to
15 "prevent inadmissible evidence from being suggested to the jury by any means"))).

16 Judges have broad discretion when ruling on motions in limine. *See Jenkins v. Chrysler*
17 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002). However, a motion in limine should not be
18 used to resolve factual disputes or weigh evidence. *C&E Servs., Inc. v. Ashland, Inc.*, 539 F.
19 Supp. 2d 316, 323 (D.D.C. 2008). To exclude evidence on a motion in limine "the evidence
20 must be inadmissible on all potential grounds." *E.g., Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp.
21 2d 844, 846 (N.D. Ohio 2004). "Unless the evidence meets this high standard, evidentiary
22 rulings should be deferred until trial so that questions of foundation, relevancy and potential
23 prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F.

1 Supp. 1398, 1400 (N.D. Ill. 1993). This is because although rulings on motions in limine may
2 save “time, costs, effort and preparation, a court is almost always better situated during the actual
3 trial to assess the value and utility of evidence.” *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216,
4 1219 (D. Kan. 2007).

5 In limine rulings are preliminary and therefore “are not binding on the trial judge [who]
6 may always change his mind during the course of a trial.” *Ohler v. United States*, 529 U.S. 753,
7 758 n.3 (2000); *accord Luce*, 469 U.S. at 41 (noting that in limine rulings are always subject to
8 change, especially if the evidence unfolds in an unanticipated manner). “Denial of a motion in
9 limine does not necessarily mean that all evidence contemplated by the motion will be admitted
10 to trial. Denial merely means that without the context of trial, the court is unable to determine
11 whether the evidence in question should be excluded.” *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

12 **B. Analysis**

13 Defendants request that the Court preclude Plaintiffs from arguing that they are entitled
14 to the replacement value of the generators allegedly destroyed by the December 11, 2011 fire.
15 They claim that the proper measure of damages is the actual cash value of the destroyed property
16 and not the replacement value. (Mot. in Limine 2–3, ECF No. 26).

17 Under Nevada law, the value of destroyed property has been calculated based on “the
18 actual value of the property at the time and place it was destroyed,” *Witt v. Nev. Cent. R. Co.*, 44
19 P. 423, 428 (Nev. 1896), the cost of repairs to restore the property to its former condition less
20 depreciation, *Richfield Oil Corp. v. Harbor Ins. Co.*, 452 P.2d 462, 467 (Nev. 1969), and the cost
21 to replace the property minus depreciation, *Harvey v. Sides Silver Mining Co.*, 1 Nev. 539, 543
22 (1865).

23 The evidence Defendants seek to exclude in this case relates in part to the quotes that
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1 Chubb received for two used Cummins generators, valued at \$1,765,370, which were
2 comparable to the ones destroyed in the fire. (*See* Generator Bids, ECF No. 33-2, Ex. 5, at 3).
3 This is the same amount that Plaintiffs determined it would cost to replace the generators. (*See*
4 Damage Summary, ECF No. 33-2, Ex. 4, at 2). Thus, even if the market value of the destroyed
5 property were the only measure of damages under Nevada law, evidence regarding the amount
6 that Plaintiffs would have to pay to acquire used Cummins generators seems quite relevant to the
7 actual cash value of the destroyed generators. More importantly, a jury needs to hear how
8 Plaintiffs arrived at their calculation of damages, which inevitably will involve evidence that
9 Defendants seek to exclude.

10 Therefore, the Court denies the Motion in Limine.

11 **CONCLUSION**

12 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (ECF No. 29) is
13 DENIED.

14 IT IS FURTHER ORDERED that Defendants' Motion in Limine (ECF No. 26) is
15 DENIED.

16 IT IS SO ORDERED.

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18 Dated: February 19, 2015 _____

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21 _____
22 ROBERT C. JONES
23 United States District Judge
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